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73-1651
In the Supreme Court of the United States

OCTOBER TERM, 1973

THEODORE J. ISAACS,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Theodore J. Isaacs, prays that a Writ of Certiorari be issued to review the final judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on March 28, 1972.

OPINIONS BELOW

The opinions of the United States District Court for the Northern District of Illinois (*United States* v. *Isaacs, et al.*, N.D. Ill. 1972, 347 F.Supp. 743; *United States* v. *Isaacs, et al.*, N.D. Ill. 1973, 347 F.Supp. 763; *United States*

v. *Isaacs and Kerner,* N.D. Ill. 1973, 364 F.Supp. 895) and of the special panel of the United States Court of Appeals for the Seventh Circuit (*United States* v *Isaacs,* 7th Cir. 1974, ... F.2d ....., supplemental opinion on rehearing, ... F.2d .....) are all reprinted in a separate Joint Appendix filed by Otto Kerner, Jr., Petitioner in No. ....., and this Petitioner.

JURISDICTION

The judgment of the Court of Appeals was entered on February 19, 1974. A timely Petition for Rehearing was denied on March 28, 1974. By Order entered April 19, 1974, Mr. Justice Rehnquist extended the time for filing this Petition to and including May 6, 1974. The jurisdiction of this Court is evoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether counts charging Kerner alone with committing perjury before the Grand Jury, with making false statements to IRS Agents—all during the investigation of this case—and with filing a tax return containing false statements concerning the acquisition and disposition of stock allegedly received as a bribe, and whether a count charging Isaacs alone with filing a tax return containing false statements concerning the same general matters were properly joined with counts charging both defendants with conspiracy and substantive offenses growing out of their alleged receipts of bribes, where the Government tacitly conceded that the perjury, false statement and false returns were not part, or in furtherance, of the conspiracy?

A. Whether joinder in this multiple-defendant case is governed by Rule 8(a) or Rule 8(b), Federal Rules of Criminal Procedure, or a combination of both?

B. Whether Rule 8(a)'s "same act or transaction or * * * two or more acts or transactions connected together or constituting parts of a common scheme or plan" test is identical to Rule 8(b)'s "same act or transaction or * * * same series of acts or transactions constituting an offense or offenses" test; or whether Rule 8(b) embodies a stricter standard by reason of its "constituting an offense or offenses" language?

C. Whether joinder here may be sanctioned on the ground that the proof necessary to establish independent counts was pertinent to proof of other, joint counts?

2. Whether a joint trial of counts charging Kerner with perjury and false statements prejudiced this Petitioner by informing the jury that the Grand Jury, who had heard Kerner's testimony, determined he was a liar, where Kerner was the principal defense witness, this Petitioner did not testify, and this Petitioner's defense was almost totally dependent upon Kerner's credibility?

3. Whether a public official's acceptance of a bribe, in violation of state law, can be characterized as a scheme to defraud the public of his honest and faithful services and the "secret profits" represented by the bribe payment, where there is no showing of an actual loss or real detriment to the public?

4. Whether intent to use the mails and to use facilities of interstate commerce is an essential element of a conspiracy to violate Sections 1341 and 1952 of Title 18?

A. Whether the jury must be instructed that intent to use interstate facilities and to use the mails is an essential element of conspiracy to violate the Travel Act and the mail fraud statute?

B. Whether conviction of a federal conspiracy to violate the Travel Act can stand in the absence of adequate proof of the use of interstate facilities and in the absence of proof of intent to use interstate facilities?

STATUTES AND RULES INVOLVED

Pertinent statutes and rules are printed in the Joint Appendix filed by Petitioners Kerner and Isaacs. Those statutes and rules are:

18 U.S.C.§371—The Conspiracy Statute.
18 U.S.C. §1341—The Mail Fraud Statute.
18 U.S.C. §1952—The Travel Act.
Rule 8, Federal Rules of Criminal Procedure, 18 U.S.C.A.
Rule 14, Federal Rules of Criminal Procedure, 18 U.S.C.A.
Illinois Revised Statutes, Chapter 38, § 33-1—Bribery.

STATEMENT

Petitioner, Otto Kerner, Jr., Petitioner in No. ....., William S. Miller, Faith McInturf and Joseph Knight were charged in a nineteen-count indictment, returned by the United States Grand Jury for the Northern District of Illinois, with various offenses against the United States arising out of their alleged activities on behalf of certain Illinois racing interests, said to have been in return for bribes of racing stock worth, to Isaacs and Kerner, more

than $150,000 each. Joseph Knight was severed because of ill health which, as all parties agreed and as the jury was instructed, precluded his being called as a witness for either side during the trial of this cause.

Subsequent to the return of the indictment William Miller and Faith McInturf entered into an immunity agreement with the Government and, by virtue thereof, agreed to testify on behalf of the Government in this and other prosecutions.[1]

Trial commenced before the Honorable Robert L. Taylor and a jury on January 3, 1973. Jury verdicts finding Kerner and Isaacs guilty of all counts in which they were charged were returned on February 19, 1973. Following appropriate post-trial motions, the District Judge entered judgments of acquittal with respect to Counts 5, 7, 10, 11 and 12 (the first charging a substantive travel act violation, and the remainder charging substantive mail fraud violations), and sentenced Isaacs to concurrent terms of three years on each of the remaining counts, subject to 18 U.S.C. 4208(a) 2. Fines of $10,000 on each of Counts 1, 2, 3, 4 and 18 were also imposed. (IV R. 250).[2]

The Indictment

Isaacs was named in fifteen of the nineteen counts. Count 1 alleged that the five named defendants together with unnamed other persons—revealed in a Bill of Particulars subsequently filed, to be Marjorie Everett—con-

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[1] Miller was one of two principal Government witnesses. Faith McInturf did not testify.

[2] "..... R. ....." references are to the volume and page of the Original Record below.

spired during a period beginning prior to January, 1961 and continuing to the date of the indictment (December 15, 1971) to commit two principal offenses against the United States:

> "To travel in interstate commerce, to use facilities in interstate commerce, including national banks, the Federal Reserve and its member banks, and to use the United States Mail, with intent to distribute the proceeds of bribery as that term is defined in Ill. Rev. Stat., ch. 38, sec. 33-1 * * *" in violation of 18 U.S.C. § 1952;
>
> "To knowingly and willfully use the United States mails and to cause the United States mails to be used in furtherance of a scheme to defraud," in violation of 18 U.S.C. § 1341.

This scheme to defraud was described as having four facets: (1) to defraud the State of Illinois and its citizens of their right to have the State's business and the administration of its laws conducted honestly, and free from undue influence, bribery and conflict of interest; (2) to defraud the State and its citizens of their right to the loyal services and performance of official duties by Miller and Kerner in their respective official capacities as Chairman of the Illinois Racing Board and Governor of the State of Illinois; (3) to defraud the State and its citizens of "secret profits" received by Miller and Kerner in the performance of their official duties; (4) and to defraud racing associations in Illinois of their right to obtain racing dates from the Illinois Racing Board free from corruption, bribery, official misconduct, conflict of interest and fraud.

Counts 2 through 5 charged all five defendants with substantive violations of 18 U.S.C., Section 1952. After ver-

dict, petitioners were granted judgment of acquittal on Count 5; the Court of Appeals reversed Petitioners convictions on Count 2, 3 and 4, holding that "the interstate activity in this case [including the incidental use of a federally regulated banking facility] was inadequate to trigger § 1952." (App. p. 30a; see also App. p. 33a)

Counts 6 through 12 charged all five defendants with devising the scheme and artifices to defraud described in Count 1, and with causing the mails to be used in execution thereof. Count 6 was predicated upon Kerner's mailing a Form 1099 IRS Information Return to Marjorie Everett showing payment of interest by him to her. The Government claimed the interest payment, which was actually made, was spurious. (See Statement *infra* pp. 17-18)

Count 8 was based on the mailing of a $7,000 check, issued by Knight to Kerner as payment of net proceeds from the sale of Chicago Harness Racing stock, from Kerner's bank to the American National Bank and Trust Company in Chicago, which served as a depository for Kerner's bank. The majority of the Court of Appeals affirmed Petitioners' conviction on this count. Senior Circuit Judge Johnsen, dissenting in part, was "unable to agree with the majority's affirmance of Kerner's [and, presumably, Isaacs'] conviction of mail fraud under counts VIII and IX as to which the mailings occurred after August, 1966. Kerner [and, presumably, Isaacs] had by that time become the full beneficial owner[s] of race track stock involved in the bribery.*** The incidents after the use of the mails which occurred in relation to Kerner's disposition of the stock or his obtaining the money therefor, did not go to the completion of the bribery, as between Mrs. Everett and Kerner. *United States* v. *Maze* decided by the Supreme Court on January 8, 1974, seems to me to require reversal as to these two counts." (App. p. 64a)

Count 9, also the subject of Judge Johnsen's partial dissent, was based on Kerner's mailing to the First National Bank of Chicago a check representing a dividend declared and paid by Chicago Harness Racing to all shareholders.

Count 13 was based on the Racing Board's mailing a race date acceptance form to the Balmoral Jockey Club (BJC), which, in its November, 1967, application for 1968 racing dates, had failed to disclose Kerner's and Isaacs' beneficial ownership of stock, although the interest of their nominee was disclosed.

Count 14 charged Kerner alone with making false material declarations before the Grand Jury on June 10, 1971, with respect to testimony given during the Grand Jury's investigation leading to the return of the instant indictment. The count alleges that Kerner gave false answers with respect to certain conversations concerning racing dates he was alleged to have had while Governor.

Count 15 charged Kerner alone with making false statements to two Internal Revenue Service agents on July 15, 1970 during an interview conducted by them in the course of their investigation of this case. Kerner was charged with deliberately concealing his interest in Chicago Harness Racing (CHR).

Count 16 charged Kerner only with attempting to evade payment of his 1966 income taxes by failing to report his acquisition of CHR and Chicago Thoroughbred Enterprises (CTE) stock as a bribe in 1966.

Count 17 charged Kerner only with making false statements in his 1967 tax return by falsely reporting his gain on the sale and exchange of CTE and CHR stock as capital gain occurred in 1967, by falsely reporting that the CTE stock was acquired in 1962, and by falsely labeling CHR stock as the "Chicago Co."

Count 18 charged Isaacs alone with attempting to evade payment of his 1966 income taxes. This claim concededly rested on the Government's theory that Isaacs (as Kerner; see *supra* concerning count 16) had received a bribe and that this bribe should have been reported as ordinary income in 1966 rather than as a capital gain on the sale of the stock in 1967.

Count 19 charged Isaacs alone with making false statements in his 1967 tax return that his shares of CTE (identified as "BAJO") were acquired in November, 1962, that he had sold shares of "Chicago Company rather than CHR, that the gain on this sale was a capital gain, and that the sale of the CTE ("BAJO") was a capital gain.

Pre-Trial Motions

Prior to trial Isaacs moved that Counts 18 and 19, charging him alone with income tax violations, be severed from the trial of counts 1 through 13, and that Counts 14 through 17, charging Kerner alone with tax violations, false declarations to the Grand Jury and false statements to Internal Revenue Service agents, be tried separate and apart from the other counts. Both aspects of the motion were denied by the District Judge, who ruled that the joinder was proper under Rule 8 and that Isaacs was not prejudiced so as to warrant relief under Rule 14 of the Rules of Criminal Procedure. (*United States* v. *Isaacs,* N.D. Ill. 1972, 347 F.Supp. 743, 761; App. pp. 101a-103a)

With respect to Isaacs' joinder claim, challenging trial of Counts 14, 15, 17 and 19 with the remaining counts, the Court of Appeals held: "When multiple defendants are charged in the same as well as multiple counts, a challenge by a single defendant to joinder of offenses in which he is charged is governed by Rule 8(a). Conversely, when one or more defendants challenge joinder and do not restrict

their attack to those offenses which pertain solely to them, Rule 8(b) applies." (App. p. 49a) Thus, Kerner's challenge to the joinder of counts 14, 15, and 17 and Isaacs' challenge to the joinder of count 19 were viewed as governed by Rule 8(a):

> "The perjury and other offenses with which we are concerned have a logical relationship. They are all connected with, or arose out of, a common plan to corruptly influence the regulation of horse racing. The perjury charge against Kerner related to his involvement with the racing industry, and evidence of that involvement was pertinent to the proof of the other offenses. *** [T]he commonalty of proof suffices to establish that the offenses were 'connected together' for the purposes of Rule 8(a)." (App. p. 50a)

Considering Isaacs' claim of misjoinder of counts charging Kerner only, the Court held:

> "Multiple defendants may be joined if they have participated in the same series of acts or transactions. The conspiracy, Travel Act and Mail Fraud counts all bore on the underlying claim of bribery. The evidence to establish the counts in question was pertinent to proof of other counts." (App. p. 50a)

In response to Kerner's claim that he was prejudiced by the joint trial of the perjury and false statement counts, based primarily on *United States* v. *Pacente,* 7th Cir. 1973, 490 F.2d 661, the Court held that a "different situation" prevailed in this case and, "if our conclusions are at odds with *United States* v. *Pacente,* supra, we can only say that we disagree with that decision." (App. pp. 51a, 52a) Judge Johnson felt that *Pacente,* if followed, would "require reversal of all of Kerner's convictions, for failure of the trial Court to grant severance." (App. p. 64a)

Isaacs claim that he was prejudiced by denial of severance of these counts was dismissed with the observation that no abuse of discretion was shown inasmuch as the Dis-

trict Judge had "instructed the jury that evidence of Kerner's perjury should not be permitted to prejudice Isaacs." (App. p. 52a)

We set forth below only such facts as are necessary for a basic understanding of the case and the questions presented.

Background

During 1960, Marjorie Lindheimer Everett organized Chicago Thoroughbred Enterprises (CTE), which was financed by bank loans of several million dollars. Mrs. Everett owned 2,000 of the 3,000 shares of stock issued by CTE. She pledged her shares as collateral to secure CTE loans. Arlington Park Jockey Club and Washington Park Jockey Club, owners of Washington Park and Arlington Park race tracks respectively, and formerly controlled by Mrs. Everett's recently deceased father, became divisions of CTE. Mrs. Everett also owned stock in the Balmoral Jockey Club (BJC). (Tr. 1324-6)[3]

Miller, a friend of Mrs. Everett's father and then a member of the Illinois Racing Board, whose duties included allocation of thoroughbred racing dates, offered and agreed to help Mrs. Everett in the creation of her racing empire, and assisted her in obtaining the financing described above. (Tr. 2881-9; 5714)

The charges in this case, excepting those relating to perjury and false statements, directly related to the acquisition and disposition, by Isaacs and Kerner, of stock in CTE, BJC, and Chicago Harness Racing Company (CHR), a later-formed enterprise.

Kerner was the Democratic candidate for Governor of Illinois in 1960. Miller assisted in financing his campaign.

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[3] "Tr. .....", references are to the Transcript of Proceedings filed in the Court below.

Through Miller, Mrs. Everett's companies contributed to the campaign, which was managed by Theodore Isaacs. Isaacs' friendship with Kerner dated back to the late 1930's, during their service together in the Illinois National Guard. (Tr. 2871-95; 6166; 6193-5)

After Kerner's election, Isaacs was appointed Director of the Department of Revenue, where he served until September 15, 1963. (Tr. 6792) No part of the indictment or evidence introduced charged Isaacs with misconduct in the performance of his official duties. The Illinois Department of Revenue had no control over, or relationship with, racing in Illinois. Kerner also appointed Miller Chairman of the Illinois Racing Board (IRB), on which Miller had served for several years.

In 1961 Miller suggested to Mrs. Everett that she enter the harness racing business in order to generate more income from her race track properties. To facilitate this, proposed changes in Illinois law concerning racing corporations were supported by Miller in the Illinois Legislature and, with the Governor's signature, became law. (Tr. 2938-9; 5938-47)

CTE refurbished Washington Park to accommodate harness racing. The Washington Park Trotting Association (WPTA) was formed to run the meets. It entered into a lease with CTE contingent upon its receipt of racing dates. (Tr. 1367-9) In 1962, Mrs. Everett and Miller formed CHR for the same purpose as WPTA. CHR had the same relationship with CTE as did WPTA. The common shares of CHR, initially issued to several businessmen, were placed in a voting trust to insure Mrs. Everett's control of the organization. (Tr. 1518-9; 2421-3) Miller suggested to Mrs. Everett that 50,000 shares of CHR stock be kept available for distribution to persons whom he felt might help the company.

Initial Offer

Several versions of the October-November, 1962, events culminating in Isaacs' and Kerner's ownership of race track stock were received at trial. According to Mrs. Everett, Miller told her it was important for her to have a friend (Isaacs) in the Kerner Administration in order to insure favorable consideration for her ventures. He told her she should make racing stock available to Isaacs and Kerner. (Tr. 1381-4, 1390-1, 1808) According to Miller, the idea of offering stock was solely Mrs. Everett's, who first broached the subject by telling him she had earlier promised Isaacs she would set aside certain amounts of CTE and WPTA stock for Kerner and Isaacs. (Tr. 2941-6) Mrs. Everett denied this had occurred. (Tr. 6276-83)

According to Kerner, in late 1962 Joseph Knight—Illinois' Director of Financial Institutions—came to him with an opportunity to invest in Mrs. Everett's racing enterprises. Kerner told Knight to talk to Isaacs about participating in the investment. Kerner then spoke to Isaacs and told him to handle the transaction as he saw fit. (Tr. 6392-5)

Isaacs did not testify at trial. His Grand Jury testimony, portions of which were read into evidence by the Government and by the defense, revealed his version that Mrs. Everett had spoken to him during 1962 about the favorable growth and progress of CTE, in which she invited him to participate. Isaacs also recalled speaking with Miller about the subject and with Joseph Knight about the potential investment opportunity. (Tr. 5478-9, 5487, 5492)

According to Mrs. Everett, Miller called her on November 8, 1962, and asked her to send him a memorandum con-

firming her commitment to set aside stock for Kerner and Isaacs. (Tr. 1384)

According to Miller, Mrs. Everett called him, expressed concern about her public image, again referred to her wish to set aside stock which she had discussed with Isaacs and Kerner, and said she would discuss the matter with her attorney Senator Lynch. Miller professed surprise and dismay at Mrs. Everett's plans. Nevertheless, he told her he intended to be in Springfield the next day and promised, at Mrs. Everett's behest, to explore the situation with the Governor. Mrs. Everett told Miller she would deliver a memorandum to him setting forth her commitment. (Tr. 2941-6) Mrs. Everett also denied this version. (Tr. 6276-83)

Miller did receive Government's exhibit 1-2 from Mrs. Everett on November 8, 1962. That memorandum read:

> Dear WS:
>
> The following memo is to confirm our telephone conversation of today. At your earlier suggestion we have been holding for OK 25 shares of CTE common, $25,000; 10,000 shares of WPTA common, $10,000. For TI, 5 shares of CTE common, $5,000; 2,000 shares of WPTA common, $2,000.
>
> We did not issue the above as you had suggested that I hold this stock until we receive further instructions from you.
>
> For your further information, you will recall that the common stock of CTE at the time of merger had a value of $1,000 a share. I shall be pleased to either issue the above stock or hold it, or handle it in any manner you suggest.
>
> Kindest personal regards,
> Marj
>
> November 8, 1962

On November 9, 1962, Miller met with Governor Kerner and Isaacs. According to Miller, he told the Governor that Mrs. Everett, in her desire to be kind and in sympathy with the Governor's financial situation, had set aside 25 shares of CTE and 10,000 shares of WPTA for him, and 5 shares of CTE and 2,000 shares of WPTA for Isaacs. Kerner said: "That's very nice of Marj." (Tr. 2951)

Mrs. Everett testified she made stock available only because she felt Miller had pressured her, and she did not feel she could afford to displease him because of the power he wielded and the extent of her investment in her racing enterprises. (Tr. 1384-91, 1808)

According to Miller he conveyed Mrs. Everett's offer to Kerner and Isaacs because Mrs. Everett was in need of Kerner's and Isaacs' favor, was eager to ingratiate herself with them, and wanted to avoid any potential adversity in connection with racing dates being considered by the Harness Board. Miller conveyed the offer in order to cause Kerner to continue to look favorably upon Mrs. Everett and her enterprises. (Tr. 2952-3)

According to Kerner, he did not speak with Miller about Mrs. Everett's stock offer on November 9, or at any time. He acknowledged the November 9 meeting, but said its purpose was for Miller to advise him of the 1963 racing dates which the Racing Board would award. (Tr. 6440-41)

However her offer was communicated, Mrs. Everett considered her 1962 offer as a binding commitment to sell CTE stock to these defendants at $1,000 per share, even though the stock at the time was worth $2,500 a share. (Tr. 1736-39) So also did her attorney (now Circuit Court of Cook County Judge) Schaller, who prepared the documents in 1966 reflecting this sale. (Tr. 2199, 2205-6)

Interim Activities

Isaacs resigned as Director of Revenue on September 15, 1963 and resumed his full-time private practice of law. In early 1964, Miller urged Kerner to withdraw the late fall 1964 harness racing dates from Maywood Park, a competitor of Mrs. Everett's enterprises. Kerner's alleged involvement in the subsequent dispute over Maywood's ability to conduct this meeting successfully was said to indicate his favoritism toward Mrs. Everett's interests, and his denial before the Grand Jury of any involvement formed part of the false declaration charge in Count 14. Isaacs was not involved in this dispute which was resolved by Maywood's retaining its dates.

In late 1964, it was rumored that Maywood would attempt to obtain the late fall 1965 harness racing dates previously allotted to Egyptian Trotting Association, one of CTE's Washington Park tenants. (Tr. 5081) Again, Kerner's alleged involvement in this matter was said to indicate his favoritism, and his denial before the Grand Jury of certain conversations he was alleged to have had formed part of the false declaration charge. Isaacs' only involvement was a conversation with Mrs. Everett in which he said he would talk to a Chicago alderman who represented Maywood. (Tr. 1406-8) No suggestion that Isaacs actually discussed this matter with anyone, including Kerner, was brought forth. The matter was resolved by Maywood's being granted Egyptian's dates, and Egyptian's receiving six additional days for its rescheduled meet. (Tr. 5128-9)

In 1965 Miller proposed to Kerner and Isaacs certain amendments to pending legislation to which racing interests, including Mrs. Everett, were opposed because of their potential confiscatory tax consequences. Eventually,

under Miller's guidance, the amended legislation passed and was signed into law. (Tr. 3063-73, 5490-5102)

Knight's Purchase of CHR stock

In 1965, because of a new Illinois law, Miller found it necessary to dispose of 50,000 shares of CHR stock which had been allocated to him in 1962 after Joseph Knight's complaint that he and his friends were displeased because they had not been offered an opportunity to purchase racetrack stock as had many legislators. (Tr. 2993-4) In May, 1965, Miller and Knight arranged to deposit the shares in numbered accounts at a brokerage house because of Knight's inability to pay for all the shares at that time. Thus, 12,000 shares went into an account for Knight and 38,000 shares went into a second account. (Tr. 2408-9, 2991-2, 2995-7)

Consummation of CTE purchase

In January, 1966, Isaacs indicated to Miller that the Governor and he were irritated about the delay in receiving the CTE stock. (Tr. 3885-7) During the ensuing eight months Isaacs arranged for the purchase of two twenty-five share CTE certificates from Mrs. Everett, through Miller and Schaller, Mrs. Everett's attorney, and using Joe Knight as a nominee. (Tr. 1420-2, 3090-7, 5769-70) In payment for these shares Isaacs gave Schaller a promissory note in the amount of $50,000 at 5% interest, and two checks. The note was backdated to November 12, 1962. One check was for $50,000; the funds for this transaction had been obtained as a result of a $40,000 loan from Faith McInturf and $5,000 contributions from Kerner and Isaacs. The second check was for $8,958, representing interest on the note, although, according to Mrs. Everett, she had never discussed a loan or the payment of interest with Kerner or Isaacs. Schaller accepted the

checks, marked the note paid, returned it to Isaacs and gave the CTE certificates, worth $6,000 a share, to Miller. Thereafter, Mrs. Everett sent Isaacs a letter, prepared by Schaller, backdated to November 12, 1962, confirming the purchase of 50 shares at $1,000 per share and stating that Mrs. Everett would hold the shares as collateral for the note, which was due on or before November 15, 1966. (Tr. 1416-29, 1448-9, 2126-30, 2140-1, 3090-7)

Count 6: One-half of the interest payment tendered by Isaacs had come from Kerner. Earlier, Kerner had sent his check representing his share of the interest payment to Mrs. Everett, who returned it through Miller and Isaacs. (Tr. 1424-7) Later, after the consummation of the sale, Mrs. Everett accepted the interest check received from Isaacs and treated that amount as interest in her 1966 tax return. (Tr. 1759-62) At the end of the year Kerner mailed a copy of an IRS form 1099 to Mrs. Everett reflecting the interest payment. Count 6 was predicated on this mailing.

Kerner's and Isaacs' purchase of CHR stock

In July, 1966, Kerner and Isaacs each contributed $5,600 which was paid into Knight's account at the brokerage house for two 14,000-share certificates of CHR, for which Knight had earlier paid Miller's account. The two certificates were transferred to Knight, who held them as a nominee for Kerner and Isaacs until October, when Schaller agreed to act as nominee because of Knight's poor health.

Count 9: In February, 1967, CHR declared a dividend. Schaller, upon advice from Knight and Isaacs, wrote checks representing the dividend payment to each defendant. In March, 1967, Kerner mailed his check to the First National Bank of Chicago for deposit. Count 9 was based on this mailing.

In the spring of 1967, Miller arranged to sell Kerner's and Isaacs' CHR stock, held by Schaller, to a friend. Two $28,000 checks were made payable and delivered to Schaller. Schaller deposited them in his personal account and wrote two equivalent checks, payable to Knight, which were delivered to Issacs. (Tr. 2119-25) Isaacs delivered the checks to Knight; Knight deposited them in his account and issued a $7,000 check to Isaacs, an identical check to Kerner, and a $41,642.48 check to Mrs. McInturf as repayment for her earlier $40,000 advance.

Count 8: Kerner deposited his check in his Antioch, Illinois savings bank. That bank mailed the check, together with all others it had received during the course of the business day, to the American National Bank and Trust Company in Chicago, its depository. Count 3 had been based on this check's clearing through the St. Louis Federal Reserve Bank; Count 7 had been based on Kerner's mailing this check to his Antioch, Illinois bank. Count 8 was based on the bulk mailing from the Antioch bank to the American National Bank.

Substitution of BJC stock for CTE stock

In May, 1967 Kerner and Isaacs agreed to exchange their CTE stock for 10,000 shares of BJC stock. The BJC shares were placed in Knight's name as nominee.

Count 13: In the summer of 1967 Miller, who had gained control of CHR and BJC, submitted an application for 1968 racing dates to the IRB. The application did not reveal Isaacs' and Kerner's beneficial ownership of BJC stock. The application was accepted, and an acceptance form was mailed to Miller on November 27, 1967. Count 13 was based on this mailing.

Disposition of shares

Each defendant reported their gain from these transactions as long term capital gains on their 1967 tax returns. In addition Isaacs identified CHR as "Chicago Co." and CTE as "Bajo Co.," which was acquired on November 12, 1962. Kerner identified CHR as "Chicago Co." He reported an exchange of "C.T. Co. for Balmoral" and showed an acquisition date of November 20, 1962.

In 1968, CHR, through Miller, acquired the defendants' BJC shares for $300,000.

As the Court of Appeals observed, "* * * during the period in question no competitor of Mrs. Everett lost any racing dates. The only gain in dates was that of the additional six days for Egyptian, a tenant of her enterprises. State revenues from horse racing increased from $19.6 million in 1961 to $40 million in 1968. * * *" (App. p. 15a) Additionally, the only change in racing dates during Kerner's administration was Maywood's successful effort to obtain Egyptian's late fall 1965 racing dates.

REASONS FOR GRANTING THE WRIT

1. Misjoinder of defendants, applicability of Rule 8(b), Federal Rules of Criminal Procedure, and interpretation of Rule 8(b) in contrast to Rule 8(a).

In 1967 the Advisory Committee on the Criminal Trial of the American Bar Association's Project on Minimum Standards for Criminal Justice viewed "the joinder and severance of offenses and defendants in criminal cases, [as] a problem area of considerable dimensions in current criminal justice administration" (American Bar Association Project on Minimum Standards for Criminal Justice, "Standards relating to Joinder and Severance," p. 1 (Tentative Draft, Nov. 1967)), and noted that "the federal courts have experienced considerable difficulty in applying the language of Federal Rule 8(b) to the variety of fact situations which have arisen * * *" A.B.A. Standards, p. 14. Nothing has occurred in recent years to diminish the force of these statements.

For example, it might have been expected, since *Ingram* v. *United States*, 4th Cir. 1959, 272 F.2d 567, that all would agree Rule 8(a) of the Rule of Criminal Procedure has no application where multiple defendants are involved. E.g., *King* v. *United States*, 1st Cir. 1966, 355 F.2d 700; *Metheany* v. *United States*, 9th Cir. 1966, 365 F.2d 90; *United States* v. *Roselli*, 9th Cir. 1970, 432 F.2d 879; *Ward* v. *United States*, D.C. Cir. 1961, 289 F.2d 877; see also, *Cupo* v. *United States*, D.C.Cir. 1966, 359 F.2d 990, 992; 8 Moore's Federal Practice (Cipes ed.), ¶ 8.06, p. 8-23. It would seem to follow that joinder, where there are multiple defendants, must, as a consequence, be tested by Rule 8(b) alone. See, e.g., *United States* v. *Roselli*, *supra*, 432 F.2d at 898.

But the Court in this case relied upon a two-pronged test for determining the validity of joinder. First, in measuring Kerner's claim as to the validity of joining Counts 14 (perjury), 15 (false statements), and 17 (false return) with the remainder of the counts in which he was charged and Isaac's claim as to the validity of joining Count 19 (false return) with the remainder of the counts in which he was charged, the Court expressly employed Rule 8(a). (App. p. 49a) *United States* v. *Sweig,* 2nd Cir. 1971, 441 F.2d 114, was said to support this manner of disposition.

But *Sweig,* after the defendant Voloshen pleaded guilty before trial, was a single defendant indictment and trial. *Cf. United States* v. *Carter,* 3rd Cir. 1968, 401 F.2d 748, 749. Consequently, it was proper there to gauge the validity of joinder by Rule 8(a) standards. This the Court did, by holding that "Sweig's acts constituting the basis for the conspiracy charges and those constituting the basis for the perjury charges were * * * [based on two or more acts or transactions connected together]. Virtually every overt act alleged in the conspiracy count formed the subject matter of one of the eight perjury counts, and would therefore be admissible in a perjury trial to show the falsity of Sweig's denial before the grand jury. Given such a clear case of commonality of proof, the conspiracy and perjury offenses were surely 'connected together' for purposes of Rule 8(a)." (441 F.2d at 118-19; see also *United States* v. *Friedman,* 9 Cir. 1971, 445 F.2d 1076, 1082-3.)

But Rule 8(b) does not contain the "connected together" language of Rule 8(a). Whereas Rule 8(a) permits joinder of different offenses against a single defendant if they arise out of "two or more acts or transactions connected together"—i.e., if they are logically related—Rule 8(b) does not permit defendants to be joined for trial merely

because the counts in which they are each charged are based on "two or more acts or transactions connected together." Rule 8(b) does not even permit two defendants to be joined together if the counts in which they are charged are based on "the same act or transaction." Multiple defendants may be joined only if the acts or transactions in which they jointly participated constitute "an offense or offenses." *United States* v. *Granello,* 2 Cir. 1967, 365 F. 2d 990, 993.

By using Rule 8(a)'s "connected together" test, the Court below eliminated the more stringent requirement of Rule 8(b) that the joint actions of the defendants must constitute "an offense or offenses." Thus, under the holding of this case, multiple defendants may be jointly indicted if any one act or transaction participated in by both constitutes an offense, even though those additional counts charging one defendant alone are not part of the offense, or any offense, in which both participated.[1]

This, we submit, is the ultimate issue presented by this aspect of this case—whether Rules 8(a) and (b), with the exception of the "similar character" test in Rule 8(a), embody identical standards, or whether the standards of Rule 8(b) are more stringent. If Rule 8 in its entirety was designed to permit the prosecution a certain amount of discretion in deciding whether to indict a single defendant for multiple crimes, or multiple defendants for conduct

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[1] By limiting its proof concerning the challenged counts to the defendant named therein (e.g., Tr. 4590, 4685, 4698, 5775-6, 5057) the Government tacitly admitted that these offenses were not part of, or committed in furtherance of, the conspiracy. *Krulewitch* v. *United States,* 336 U.S. 440 (1949); *Lutwak* v. *United States,* 344 U.S. 604 (1952); *Grunewald* v. *United States,* 353 U.S. 391 (1957); cf. *Bruton* v. *United States,* 391 U.S. 123 (1968).

ultimately reflecting a single crime, subject only to the condition that the choices must be mutually exclusive of each other, the Opinion in this case eliminates much, if not all, of the mutual exclusivity between choices.

This is also reflected by the manner in which the Court resolved Kerner's claim that Count 19 (charging Isaacs) and Isaacs' claim that Counts 14, 15 and 17 were improperly joined. Here, although acknowledging that Rule 8(b) governed, the Court applied Rule 8(a) standards by neglecting to observe *Granello's* caution that the series of acts or transactions must constitute an offense or offenses. (365 F.2d at 994.) Thus joinder was deemed proper because (1) "The evidence to establish the counts in question was pertinent to proof of other counts[,]" and (2) "* * * the pertinent offenses * * * were all parts of the same series of acts or transactions, and hence subject to joinder under Rule 8(b)." (App. pp. 50a, 51a)

These issues arise repeatedly in federal criminal trials. The instant case is an excellent forum from which to announce the meaning of and essential differences between Rules 8(a) and (b).

2. Prejudice arising from joint trial with co-defendant charged with perjury, where that co-defendant is principal witness for the defense.

Isaac's claim that he was prejudiced by the joint trial of those counts charging Kerner alone with having made false statements to the Grand Jury and to IRS Agents during the investigation of this case is essentially no different than Kerner's claim that he was prejudiced by the joint trial. Nevertheless, the courts below have viewed these claims differently. The basic problem is the same, however, and certiorari should be granted to resolve the

issue, which directly relates to a basic problem of fairness in the trial of criminal cases.

In *United States* v. *Pacente,* 7th Cir. 1973, 490 F.2d 661, a panel of the Seventh Circuit consisting of Chief Judge Swygert, Circuit Judge Sprecher, and Senior District Judge Poos, sitting by designation, held that the joinder of perjury and substantive offenses imparts knowledge to the petit jury that the Grand Jury found the defendant lied in testimony before them when he denied the substantive violation, and thus "serves to impair a defendant's ability to effectively defend himself on the substantive charge." (490 F.2d at 664.) In terms particularly applicable here, the Court amplified its reasons for so holding: "In the event the defendant testifies concerning the substantive charge, the knowledge of the false declaration count has the effect of informing the petit jury that the defendant's testimony is not to be believed. Accordingly, the defendant is impeached as soon as he reaches the witness stand. On the other hand, in the event that defendant chooses not to take the stand the substantive offense is substantially reinforced by the addition of the false declaration count."[2] (490 F.2d 664.)

In *United States* v. *Gill,* 7th Cir. 1973, 490 F.2d 233, decided the same day as *Pacente,* the Seventh Circuit ruled that a defendant was not prejudiced by reason of his co-defendant's indictment for perjury under identical circum-

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[2] Petitioner Isaacs did not testify. Thus a subsidiary question presented is whether the conspiracy, Travel Act and mail fraud charges against him were reinforced by the Grand Jury's "finding" that he lied by stating in his 1966 Income Tax Return that he acquired his CTE stock on November 12, 1962, and that the sale of CTE and CHR were long term capital gains, as the Grand Jury alleged in Count 19.

stances as existed in *Pacente.*[3] Unlike the present case, both Gill and his co-defendant, Fahey, had been indicted (in separate, joined counts) for perjury, and each testified at trial in a manner supportive of the other's innocence. Rejecting each defendant's claim that he had been prejudiced by the jury's being made aware of the perjury charge against his witness-co-defendant, the Court said: "The prejudice, if any, amounted to the fact that the jurors were aware that the co-defendant was charged individually with an additional crime which was separate from the charges against the other defendant. The jurors were instructed by the judge that the evidence relating to the perjury charge against one defendant could not be used as evidence to prove any other count. Under these circumstances, we are not prepared to hold that there was an abuse of discretion in granting a severance of defendants." (490 F.2d at 239.)

Strangely, this was the identical contention advanced by the Government, and rejected by the Court, in *Pacente*: "The Government responds that this case is no different from any other one, 'since the existence of the indictment is an obvious indication that the Grand Jury felt that the defendant was guilty' and therefore there was no prejudice to Pacente in trying both counts together. While this observation may have applicability to a multicount indictment on various substantive charges, we find it to be an over simplification and inapplicable to the situation before us. It is one thing for the petit jurors to believe that the grand jury concluded that probable cause existed that

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[3] The Court also held that Gill and Fahey had each consented to and waived any error arising from the joint trial of their perjury charges and the underlying substantive offense. (490 F.2d at 238)

the defendant committed the substantive offense. It is quite another thing, however, for the petit jurors to know that the grand jurors—laymen like themselves—believed the defendant to have lied to them."[4] (490 F.2d at 664; see also, p. 665: "We are not persuaded * * * that the court's limiting instruction [not to consider evidence regarding the perjury charge as evidence on any other count of the indictment] cured the prejudice that might have resulted by trying the two counts together.")

If a "rule" may be derived from *Pacente, Gill* and this case it is this: a defendant may be prejudiced when the jury is made aware that the Grand Jury did not believe, and chose to indict for perjury on the basis of, *his* denial of having committed the underlying substantive offenses, but he is not prejudiced when the jury is made aware that *his principal witness* has been accused of lying by the Grand Jury. The fairness of such a rule, or distinction, is the issue presented for review.

There can be no question but that Kerner was a "witness" for Isaacs. The Court below found there had been sufficient evidence in this case of "the offer of a bribe, the acceptance of the offer, the corrupt intent of the offerors, the knowledge by the offerees of that intent, the receipt of valuable property by the offerees, and actions by the

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[4] In a different context, but with powerful effect in this area, the United States Attorney argued to the jury here that the Grand Jury—consisting of twenty-three citizens—had heard the evidence and the witnesses, and had voted the indictment. (Tr. 7318) It was repeatedly brought out that Kerner and Isaacs had testified before the Grand Jury, and both were accused of lying to the Grand Jury. (Tr. 7006-7, 7395) Finally, the jury were told that Kerner's perjury was the "heart of the case" and colored every other count, including those in which Isaacs was charged. (Tr. 7393-4)

offerees favorable to the offerors." (App. p. 28a) Kerner denied there had been an offer of a bribe, that any offer had been accepted, that he had any knowledge of any corrupt intent of the offerors, and that any actions had been taken favorable to the offerors as a result of their offer, or with corrupt intent.[5] Additionally, he explained the circumstances under which he and Isaacs accepted Mrs. Everett's offer of stock. More in fact than in theory, Isaacs' case depended upon the jury's believing Kerner's testimony concerning the November 9, 1962, meeting with Miller and his explanation concerning his official actions in the years following. Significantly, the perjury and false statement charges focused upon these two areas.

Had Kerner not appeared before the jury as one who was indicted for perjury for giving the same testimony, there was no conceivable manner in which the jury could have been told that the Grand Jury had heard his testimony and rejected it as wilfully false. See *e.g., Michelson* v. *United States,* 335 U.S. 469, 482 (1948); *Roberson* v. *United States,* 5th Cir. 1957, 249 F.2d 737, 742; *Pearson* v. *United States,* 6th Cir. 1951, 192 F.2d 681, 699. The Court should grant its writ to determine the basic fairness of any defendant's standing trial in a criminal case under these circumstances.

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[5] Although there were claims made during trial that Isaacs had taken favorable action for Mrs. Everett and her interests, these claims were largely illusory. Not only did Isaacs not take any action favorable to Mrs. Everett, he was not in an official position to do so. As is clear from the Opinion of the Court below, those actions which might be construed as being favorable to Mrs. Everett were official actions of the Governor (e.g., App. pp. 6a-9a)—not Isaacs.

3. Existence of scheme to defraud where only loss is the State's right to "honest and faithful" services.

In recent years the federal government has utilized the mail fraud statute as a means of extending federal criminal jurisdiction into areas of purely local misconduct and/or commercial immorality. Until recently the statute was employed only in cases where the victim had suffered a "real detriment." Now, however, the government seeks to employ the statute in such a fashion as to gain jurisdiction over what, for lack of a better term, may be characterized as "fiduciary immorality."

The history of this effort may be traced from *Shushan* v. *United States,* 5th Cir. 1941, 117 F.2d 110, where two public officials schemed with bond salesmen and others to manipulate a refunding of municipal bonds at a lower interest rate and, thereby, to realize and share fees of approximately one-half million dollars. Although the issuing public body realized a profit by way of reduced interest rates, most of this profit was eroded by the exorbitant fees which the defendants received. Noting that the "potential profit, all of it, was the property of the Board * * * [and that the] defendants had no original right to any of it" (117 F.2d at 119), the Fifth Circuit held that the defendants' activities deprived the public of this profit and amounted to a scheme to defraud within the meaning of the mail fraud statute.

When officials of the City of Alexandria, Louisiana, caused the city to purchase buses at inflated prices so they could receive kickbacks on the sales prices, the Fifth Circuit held that the receipt by these officials of funds which were generated at their principal's expense amounted to a scheme and artifice to defraud. *Bradford* v. *United States,* 5th Cir. 1942, 129 F.2d 274.

United States v. *Procter and Gamble Co.*, D.C. Mass. 1942, 47 F. Supp. 676, marked a departure from earlier cases. There, private citizens were charged with having devised a scheme to defraud by having paid employees of a competitor to steal their employer's trade secrets. Basing his decision on long-standing principles of agency law, the District Judge held that, in charging an attempt to tamper with an employer-employee relationship for the purpose of causing the employee to breach his duty to his employer by wrongfully divulging confidential information belonging to his employer, the indictment charged an offense. (7 F.Supp. at 678) In theory and in fact, the indictment charged that the defendants' conduct was designed to steal trade secrets and thus to cause their victim a "real detriment."

The *Procter and Gamble* theory was tried in *Epstein* v. *United States*, 6th Cir. 1949, 174 F.2d 754. The defendants were charged with a scheme to defraud arising from the sale of supplies to two public corporations managed by the defendants from several companies in which the defendants had an interest. There was no proof of real detriment to the alleged victims. At most, the defendants had violated their fiduciary duties by failing to reveal their dual allegiances. In overturning the defendants' convictions, the Sixth Circuit held that the defendants' failure to disclose their dual allegiances did not amount to actual fraud. "At the most, under the circumstances of this case, such failure to disclose could amount only to a constructive fraud; and that is not sufficient to sustain a charge of using the mails to defraud." (174 F.2d at 768)

A trend took a slightly different tack in 1962 when, in *United States* v. *Hoffa*, S.C. Fla. 1962, 205 F.Supp. 710, 716, the District Court ruled that the knowing use of a fiduciary position to obtain "secret profits at the expense

of" a principal was not only a breach of the fiduciary duty but an act of fraud within the meaning of the mail fraud statute. See also *Post* v. *United States,* D.C. Cir. 1968, 407 F.2d 319, 329. This theory of prohibiting profit "at the expense of a principal" was employed in *United States* v. *Faser,* E.D. La. 1969, 303 F.Supp. 380, where the indictment alleged that the defendants had schemed to defraud the State of Louisiana by using "their positions of public trust for the purpose of realizing private financial gain from the deposit of said public funds of the State * * *, thus depriving the State * * * of the honest and faithful performance of their duties as public officials * * * *" (303 F.Supp. at 381) The District Judge overruled motions to dismiss the indictment, observing:

> "There was nothing in the law to prevent the State from receiving interest, and, if the charges in this indictment are true, there can be little doubt of the fact that there was a *very real* and substantial potential profit available to the State if and when it chose to avail itself of it. * * * Thus, if he [the defendant] received and kept a profit derived from the deposit of State funds, he kept something that, under the law, belonged to the State, thus depriving the State of a *very real* potential profit." (303 F.Supp. at 384; emphasis added) See also *United States* v. *Dorfman,* S.C. N.Y. 1971, 335 F.Supp. 675.

The Court went on to note, however, that the indictment could also be sustained on the theory that the defendants had derived "secret profits" from their activities in the course of their employment by the State, and that they had denied the State their "faithful services." (303 F.Supp. at 383)

These theories were advanced by the government in *United States* v. *George,* 7th Cir. 1973, 477 F.2d 508, a

case involving payment of kickbacks in private industry. There, a manufacturer of cabinets for the Zenith Radio Corporation had paid kickbacks to Zenith's purchasing agent. Although the evidence did not show inflated prices, poor workmanship or other direct loss to Zenith as a result of these kickbacks, the government claimed that the "secret profits" received by the purchasing agent and the resulting deprivation of his "faithful services" amounted to a fraud upon Zenith.

The *George* Court withheld full approval of this theory:

> "We need not accept the government's far-ranging argument that any time an agent secretly profits from his agency he has committed criminal fraud. Not every breach of every fiduciary duty works a criminal fraud. But here Yonan's duty was to negotiate the best price possible for Zenith or at least to apprise Zenith that Greensphan was willing to sell his cabinets for substantially less money [i.e., the amount paid as a kickback]. Not only did Yonan secretly earn a profit from his agency, but also he deprived Zenith of material knowledge that Greensphan would accept less profit. There was a very real and tangible harm to Zenith in losing the discount or losing the opportunity to bargain with a most relevant fact before it." (477 F.2d at 512-3)

Thus, Judge Cummings characterized the crime as Yonan's "*actually* not giving his honest and faithful services to Zenith's *real* detriment." (477 F.2d at 413; emphasis added)

Assuming the bribe charged in this indictment, no real loss or detriment was shown as a result of the defendants' conduct. The State of Illinois did not lose the interest on

deposits that the State of Louisiana lost in *Faser*. Nor was there proof that anyone lost their right to bargain in the market place, as in *George*.[6] What was lost was a conceptual right, and it is no denigration of that right to remand redress for its loss to local bribery laws.

This case, we submit, affords the Court an opportunity—exercised frequently in recent years[7]—to establish parameters of federal criminal jurisdiction, and to particularize the reach of the mail fraud statute. Absent such particularization, the statute is literally susceptible of being read as imposing federal criminal sanctions on every breach of a fiduciary duty accompanied by the use of the mails in execution of the breach.

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[6] The instant case, despite its lack of proof that the State of Illinois, its citizens, or the racing associations doing business in the State of Illinois suffered any "real detriment," does not represent the ultimate effort by the government to use the mail fraud statute as a means of enforcing public and private morality. Pending in the United States District Court for the Northern District of Illinois and in the Court of Appeals for the Seventh Circuit are mail fraud prosecutions which charge, in essence, that money paid Chicago city aldermen as a result of their not objecting to proposed zoning changes, where no duty to object or not to object is shown, is a scheme to defraud the citizens of Chicago of the aldermens' faithful services and the monies they have received. (*E.g. United States* v. *Staszcuk*, No. 73-1869, United States Court of Appeals for the Seventh Circuit.) Pending in the United States District Court for the Northern District of Illinois (*United States* v. *Bush*, No. 74 CR 135) is a charge that a City of Chicago employee committed "mail fraud" by not disclosing to, and by concealing from, the City his interest in a company which did business with the City.

[7] E.g., *United States* v. *Bass*, 404 U.S. 336 (1971); *Rewis* v. *United States*, 401 U.S. 808 (1971).

4. Failure to instruct as to, and lack of proof of, intent to use interstate facilities.

In simplest terms, the conspiracy count charged that the defendants violated 18 U.S.C. §371 by agreeing to use facilities in interstate commerce to distribute the proceeds of bribery and to use the mails in execution of a scheme and artifice to defraud. Despite its conclusion "that the interstate activity in this case was inadequate to trigger §1952" (App. p. 30a), thus leading it to disapprove and reverse all of the remaining substantive Travel Act convictions, the Court below determined that the conspiracy count should stand because (1) "the evidence showed the requisite intent to use the mails" and (2) "Under the Travel Act the use of the interstate facilities furnishes only the jurisdictional base and need not be intentional. The pertinent intent required by the statute relates to the distribution of the proceeds of an unlawful activity. * * * Intent to provide the jurisdictional base is not essential to proof of conspiracy to commit the crime." (App. p. 40a)

In arriving at the first of these judgments, the Court considered only half of the claim made in the proceedings below. To be sure, Petitioners both claimed that the evidence was insufficient to show the requisite intent to use the mails.[8] The special panel rejected this claim, noting that it did not sit to "retry the case, weigh the evidence, or determine the credibility of witnesses. *United States* v. *Miles*, 7 Cir., 401 F.2d 65, 67. The verdict of the jury must be sustained if, taking the view most favorable to the government, substantial evidence and reasonable inferences there-

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[8] *United States* v. *Pereira*, 347 U.S. 1 (1954); *Farmer* v. *United States*, 2nd Cir. 1915, 223 Fed. 903; *Mazurosky* v. *United States*, 9th Cir. 1939, 100 F.2d 958.

from support the action of the jury. *Glasser* v. *United States*, 315 U.S. 60, 80, and *United States* v. *Zimmerman*, 7 Cir., 326 F.2d 1, 3." (App. pp. 27a-28a)

But this attitude depends upon an assumption that the jury was properly instructed, for no court can defer to the verdict of jury inadequately instructed on essential elements. See *United Brotherhood of Carpenters, etc.* v. *United States*, 330 U.S. 395, 408 (1946); *Weiler* v. *United States*, 323 U.S. 606, 611 (1944); *Nye & Nissen* v. *United States*, 336 U.S. 613, 623-4, Frankfurter, dissenting: "Our duty is not to sustain merely on the basis of a general sense that crime has been committed; our duty is to sustain only if the applicable procedural requirements have been satisfied." In this case, although requested so to do, the trial judge failed to instruct the jury that intent to use the mails was an essential element of the conspiracy charge. In the absence of a proper instruction on this critical element, judgment on the conspiracy count should not be allowed to stand on the dangerous principle, implicit in the Opinion below, that, although the jury was not properly instructed, there was sufficient evidence to warrant a finding had it been properly instructed. See *Screws* v. *United States*, 325 U.S. 91, 107 (1944).

However intriguing the issue of whether a jury verdict may be sustained on the basis of principles not explained to the jury (*cf. Pinkerton* v. *United States*, 328 U.S. 640, 645 (1945); *Nye & Nissen* v. *United States*, 336 U.S. 613, 618 (1948)), the second leg of the Court's Opinion represents on extension of the federal law of conspiracy so far not undertaken by any other Circuit.

To date, *United States* v. *Roselli*, 9th Cir. 1970, 432 F.2d 879, had represented the furthest advance. *Roselli* held, as the Court below observed, that intent to use interstate facilities was not an essential element of a federal charge

of conspiracy to violate the Travel Act. Contrary to holdings or suggestions of other Circuits,[9] including the Seventh,[10] the Roselli Court held:

> "[Defendant's] argument is that conspiracy to commit a federal substantive offense necessarily includes an agreement upon all elements of that offense. We think it sufficient that the agreement contemplates the commission of a crime and that the crime contemplated is in fact and law a federal offense.
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> • • •
>
> "It may be argued that because a conspiracy to commit a substantive offense may exist without actual commission of the substantive offense, conspiracies to commit state crimes might be charged under the federal conspiracy laws if there were no need to prove agreement about the aspects of the crime that confer federal jurisdiction. The simple answer is that absent the presence of the jurisdictional element, no charge can be made. The point is not that the jurisdictional element need not exist, but merely that there need be no proof that the defendants were aware of its existence." (432 F.2d at 891-2.)

Interestingly, *Roselli's* "simple answer" to the fear that state crimes would be charged under federal conspiracy laws is neither simple nor an answer in this case. The District Court in the case of Count 5 and the Court of Appeals in the case of Counts 2, 3 and 4 determined that the jurisdictional element was absent. Petitioners now stand convicted of conspiracy to distribute the proceeds of bribery, without so much as adequate proof of the federal jurisdictional

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[9] *United States* v. *Barnes*, 6th Cir. 1967, 383 F.2d 287; cf. *United States* v. *Marquez*, 2nd Cir. 1971, 449 F.2d 89.

[10] Cf. *United States* v. *Ruthstein*, 7th Cir. 1969, 414 F.2d 1079, 1081-2; *United States* v. *Fellabaum*, 7th Cir. 1969, 408 F.2d 222, 224.

element. The "point" which *Roselli* so carefully sought to carve out—"not that the jurisdictional element need not exist, but merely that there need be no proof that the defendants were aware of its existence"—has been obliterated by the decision in this case. Even if *Roselli* correctly states the law with respect to the necessity of proving intent—a proposition we dispute—under *Roselli's* own reasoning the conspiracy charge here must fall.

On April 15, 1974, this Court granted its Writ of Certiorari in *United States* v. *Feola,* No. 73-1123 (reported *sub nom* United States v. Alsondo, 2nd Cir. 1973, 486 F.2d 1139) to review a portion of the very question presented here: "Must a prosecution for conspiracy to violate a federal law establish that the defendant knew of a jurisdictional element when such knowledge need not be shown in a prosecution for the underlying offense?" Rejecting the apparently contrary holding in *Roselli* (486 F.2d at 1343, n.9), the Second Circuit had ruled in *Alsondo* that its own prior decisions,[11] as well as those of other circuits,[12] warranted adherence to the rule that "specific knowledge of factual circumstances conferring federal jurisdiction • • • is required for proof of conspiracy • • • •" (486 F.2d at 1343) In accordance with this Court's usual practice, we ask, so far as this aspect of our case is concerned, that the Writ be granted and our case be decided on the merits in the light of the Court's decision in *Feola.*

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[11] *United States* v. *Crimmins,* 2nd Cir. 1941, 123 F.2d 271; *United States* v. *Sherman,* 2nd Cir. 1948, 171 F.2d 619, cert. denied, 337 U.S. 931 (1949); *United States* v. *Vilhotti,* 2nd Cir. 1971, 452 F.2d 1186, cert. denied, 406 U.S. 947 (1972).

[12] *United States* v. *Barnes,* 6th Cir. 1967, 383 F.2d 287, cert. denied, 389 U.S. 1040 (1968); *Nassif* v. *United States,* 8th Cir. 1966, 370 F.2d 147; cf. *United States* v. *Hall,* 4th Cir. 1965, 342 F.2d 849, 852 n.4, cert. denied, 382 U.S. 812 (1965).

CONCLUSION

For the above and foregoing reasons, as well as those applicable reasons stated by Petitioner Otto Kerner, Jr., the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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